tion 1103 in an arbitrary manner by misleading Petitioners in October and November 2002 as to the SEC's intent to apply the statute to the restructuring payments.

Factual Background

The payments at issue arose from Yuen and Leung's employment at Gemstar-TV Guide International, Inc. ("Gemstar"), and their departure from that employment in 2002. Yuen, the then-CEO of Gemstar, was party to a January 1998 Employment Agreement with Gemstar's predecessor, Gemstar International Group Limited. ("GIGL") (ER 119-40)[1] Under the Employment Agreement, Yuen was to receive as compensation (i) a base salary, (ii) annual "merit" and "incentive" bonuses, and (iii) vacation pay. (ER 122-23, 125, 138-40.) Including an automatic renewal period, the Employment Agreement was for a term of eight years. (ER 119-20) In the event of a termination without cause, the agreement provided that Yuen would receive a lump-sum severance payment in an amount equal to his then-current base salary "multiplied by five." (ER 129)

Leung, the then-CFO of Gemstar, also had an employment agreement with GIGL. (ER 141-58) Under her March 1998 Employment Agreement, Leung was to receive as compensation a base salary, an incentive bonus, and vacation pay. (ER 143-45, 157-58) Including the automatic renewal period, the term of Leung's Employment Agreement was also for eight years. (ER 142) Leung's agreement similarly provided that in the event of a termination without cause, she would receive a lump-sum severance payment based upon a multiple of her base salary. (ER 148-49)

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[1] Citations in the form "ER __" are to the Excerpts of Record filed by Petitioners in the Ninth Circuit.

In July 2000, GIGL and TV-Guide International, Inc. ("TV Guide") merged to form Gemstar. (ER 15-16) Following the merger, Yuen entered into a Stockholder's Agreement with The News Corporation Limited ("News Corp."), TV Guide's largest stockholder and, following the merger, a 42 percent shareholder of Gemstar. Under the Stockholder's Agreement, Yuen and Leung were guaranteed their positions at Gemstar under their Employment Agreements until 2005. (ER 16.) The agreement also provided that overall control over management and direction of the company would be divided equally between Petitioners and News Corp., with Yuen and News Corp. each having the power to appoint half of Gemstar's board of directors. (ER 16)

By the summer of 2002, a serious disagreement over the strategic direction of the company had developed between Petitioners and News Corp. The dispute focused on one of the principal products offered by Gemstar, its Interactive Program Guide ("IPG"), an interactive, on-screen electronic television guide that enables viewers to scan, sort and preview programs on hundreds of cable and TV channels. (ER 16) Yuen and Leung saw the IPG as a significant source of revenue for Gemstar itself, both through licensing fees from the cable and satellite operators who would implement the IPG on their systems, and from advertising revenue generated by ads placed on the IPG. (ER 16) News Corp., on the other hand, sought to use the IPG as a means of increasing the reach and distribution of its other cable products, such as Fox Sports or Fox News Channel. News Corp. wanted to greatly reduce the IPG licensing revenue generated from cable and satellite operators, in exchange for their agreement to carry News Corp. channels. (ER 16-17) These divergent visions of the company's future resulted in corporate gridlock at Gemstar. (ER 17)

In an effort to unblock the impasse affecting the company's operations, News Corp. and Petitioners entered into restructuring negotiations. An agreement was ultimately reached pursuant to which Yuen and Leung would resign their positions as CEO and CFO; Yuen would relinquish his right to appoint half the Gemstar board; and News Corp. would become majority, and controlling, shareholder. (ER 17) As consideration for relinquishing their managerial positions and control over the operation of the company, Yuen and Leung were to receive payments due them under their employment agreements for terminations without cause. (ER 17)

Also under the restructuring, both Petitioners were to receive a termination, or severance, payment. Although those severance payments were based on the formulas set forth in the Employment Agreements, the Petitioners agreed to a substantial reduction of the final amounts due. Thus, under the restructuring agreement, Yuen was to receive a severance of $22.45 million, voluntarily reduced from the $37.31 million otherwise due Yuen for a termination without cause under his Employment Agreement. (ER 17) Leung was to receive $6.96 million of severance under the restructuring, reduced from the $7.07 million due Leung under her Employment Agreement for a termination without cause. (ER 17-18)

In addition to the severance payments, each Petitioner, as of the time of the restructuring negotiations, was owed certain accrued and earned, but unpaid, compensation items, consisting of salary and bonuses. (ER 18-19) Petitioners also were owed under their agreements earned, but unpaid, vacation pay.

The total payments due to Petitioners under the restructuring agreements were as follows:

Henry Yuen

Termination Fee	$22,452,640
Unpaid Items:	
Vacation	$ 1,921,870
Salary	$ 1,028,489
Bonus	$ 4,080,418
Total Items:	$ 7,030,777

Total Payments $29,483,417

(ER 307-12)

Elsie Leung

Termination Fee	$ 6,957,953
Unpaid Items:	
Vacation	$ 474,406
Salary	$ 191,231
Bonus	$ 544,058
Total Items:	$ 1,209,695

Total Payments $ 8,167,648

(ER 307-12)

Contemporaneous with the restructuring negotiations, the SEC commenced an informal investigation of Gemstar. Then, on October 17, 2002, the SEC issued a formal order of investigation of Gemstar. (ER 21) On November 6, 2002, Gemstar advised Petitioners that they would not immediately receive the agreed-upon restructuring payments, which, at the SEC's direction, Gemstar would deposit into segregated accounts for a six-month period. (ER 21-22) At the conclusion of the six months, if no agreement had been reached between the SEC and petitioners as to the disposition of these payments, the payments were to be disbursed to Petitioners immediately. (ER 29, 33)

Proceedings In The District Court

On May 5, 2003, one day before the funds were to be released to Petitioners, the SEC applied to the District Court for a freeze order pursuant to Section 1103. The District Court exercised subject matter jurisdiction pursuant to Section 1103.

On June 20, 2003, the District Court issued a decision granting the SEC application for a freeze. (ER 355-77) In its decision, the court acknowledged that the text of Section 1103 was "unclear" and "inadequate" (ER 365), and also acknowledged that Petitioners' interpretation of "extraordinary payments" as improper corporate payments was colorable. (ER 363) Ultimately, however, the District Court determined that the payments at issue should be deemed "extraordinary payments" because (i) they were the product of substantial negotiation; (ii) the payments were made in connection with Yuen and Leung's departure from senior management, an event that was disclosed an 8-K filing, and (iii) the payments were "large." (ER 372-73) The temporary freeze was extended indefinitely when the SEC filed an enforcement action against Petitioners and others in June 2003. (ER 378-379)

Proceedings On Appeal

Yuen and Leung appealed the escrow order and, on May 12, 2004, a panel of the Ninth Circuit reversed the district court. The panel determined that the district court erred when it concluded that the restructuring payments were "extraordinary payments." Finding that "proof by admissible objective evidence of what is ordinary is necessary . . . to determine what is extraordinary" (39a), the panel thoroughly examined each of the three bases relied on by the district court and held that the first two were "irreducibly subjective" conjecture

and the third basis was simply erroneous as a matter of logic. (37a) The Court stated:

> First, the district court found that the negotiation of the termination agreements for Appellants was "extraordinary". . . . *[but] [n]othing in the record suggests this extended negotiation constitutes a deviation from the norm for corporate decision-making of this type* . . . .
>
> [S]econd . . . the district court based its finding that the proposed payments were "extraordinary payments" [because of] their size . . . *[but] [t]here is no evidence in the record of what similarly placed officers and board members of corporations of similar revenues and worth are paid upon termination* . . . .
>
> Last, the district court found it significant that after the termination contracts were finalized, defendant Gemstar chose to report the terms in a Form 8-K filing . . . . *But, a discretionary corporate disclosure is not an admission that the company has paid an "extraordinary" amount.*

(33a-36a) (emphasis added).

The Court then concluded that the escrow order had not been "guided by precepts of proportionality and precedent," and that any "reasonable interpretation of the common meaning of Section 1103 requires that the questioned payments be out of the ordinary." (38a-39a) Because no objective evidence had been adduced in the district court that the payments were out of the ordinary, the panel reversed the judgment. (39a)

On March 22, 2005 the Ninth Circuit, sitting *en banc*, set aside the panel decision. The court stated:

> "Extraordinary" means, in plain language, out of the ordinary. In the context of a statute aimed at preventing the raiding of corporate assets, "out of the ordinary" means a payment that would not typically be made by a company in its customary course of business. The standard of comparison is the company's common or regular behavior. Thus, the determination of whether a payment is extraordinary will be a fact-based and flexible inquiry. Context-specific factors such as the circumstances under which the payment is contemplated or made, the purpose of the payment, and the size of the payment may inform whether a payment is extraordinary, as the district court properly noted in this case. For example, a payment made by a company that would otherwise be unremarkable may be rendered extraordinary by unusual circumstances. See BLACK'S LAW DICTIONARY 586 (6th ed. 1990) (defining "extraordinary" as "[o]ut of the ordinary; . . . . employed for an exceptional purpose or on a special occasion").
>
> A nexus between the suspected wrongdoing and the payment itself may further demonstrate that the payment is extraordinary, although such a connection is not required. Evidence of the company's deviation from an "industry standard"—or the practice of similarly situated businesses—also might reveal whether a payment is extraordinary. Again, however, the statute does not compel any specific method of making the determination but allows for the consideration of a variety of factors, as the situation may warrant.

(92a-94a) (footnote omitted). The court provided no guidelines for interpreting Section 1103, stating only that in determining whether a payment is "extraordinary" one must consider "(1) the circumstances of the pay-

ment, (2) the purpose of the payment, and (3) the size of the payment." (94a)

The author of the panel decision, Judge Bea, filed a dissent. Judge Bea pointed out that the majority erroneously interpreted the phrase "extraordinary payments" to mean "payments under extraordinary circumstances." (105a). The dissent explained:

> [T]he majority has not so much interpreted the statute as it has rewritten it. As explained above, the majority's interpretation of "extraordinary payments" amounts to "payments under extraordinary circumstances." See Maj. Op. at 3417-20. Indeed, the majority itself explains that "a payment made by a company that would otherwise be unremarkable may be rendered extraordinary by unusual circumstances." *Id.* at 3418. Thus, under the majority's interpretation, *any* payment following "extraordinary circumstances" may be subject to escrow. Yuen and Leung could have been paid $1 or 1 billion—it would make no difference to the majority.

(109a).

The dissent also demonstrated that the "circumstances" relied upon by the majority, which included revenue restatements, a securities fraud investigation, significant declines in Gemstar's stock price, and a public relations crisis, could not, in themselves, render the payments at issue "extraordinary:"

> Some of these factors are certain to be present anytime the SEC investigates a company for possible violations of the federal securities laws, and the rest are likely to be present. . . . By defining "extraordinary" to mean little if anything more than that circumstances exist that might give cause to the SEC to initiate a lawful investigation, "extraordinary"

> serves no independent modifying propose. Each payment made in the midst of circumstances likely to lead to an SEC investigation becomes made under "extraordinary circumstances," therefore an "extraordinary payment."

(111a).

Apart from being inconsistent with the language of the statute, the dissent found the majority's approach to raise substantial practical concerns. According to the dissent:

> [E]ven had the majority not rewritten the statute and, indeed, written the very term at issue out of the statute, its interpretation is unworkable as a practical matter. The majority first interprets "extraordinary payments" as those "that would not typically be made by a company in *its* customary course of business," Maj. Op. at 3417 (emphasis added). Thus, as the majority explains, "[t]he standard of comparison is *the company's* common or regular behavior." *Id.* (emphasis added). This alone raises a significant practical concern. Presumably, terminating the CEO's and CFO's employment is never done "by a company in *its* customary course of business." *Id.* (emphasis added). I think we can all agree that these events do not occur, for any given business, each Monday morning as the doors open for business. Does this mean, then, that any payment to a departing CEO, CFO or, for that matter, any officer or director may be subject to escrow? . . . . Can this really be what Congress meant by "extraordinary"?

(112a-113a.)

The dissent summarized its view as follows:

> Section 1103 empowers the SEC to escrow "extraordinary payments," not payments made under extraordinary circumstances, particularly where

> "extraordinary circumstances" means little if anything more that that the company is under investigation for securities violations. Further, if it is to be a workable standard, the relevant comparison must be not to the company at issue, but to other comparable companies, under circumstances which have not resulted in an investigation by securities agencies, but which are otherwise comparable. Because the SEC failed to adduce any such relevant evidence, I would vacate the district court's order and permit the SEC the opportunity to do so.

(123a)

REASONS FOR GRANTING THE WRIT

The SEC has used a strained and erroneous interpretation of Section 1103 to freeze Petitioners' assets without showing that the payments at issue were "extraordinary payments" in any respect and without showing that the payments were wrongfully derived. The Ninth Circuit's construction of Section 1103, which affirmed the SEC's position, represents a significant misreading of the statute and the congressional intent underlying the act. If left uncorrected, this interpretation will permit the SEC to freeze any payments to be made to corporate executives once an SEC investigation has commenced, and will thus provide the SEC with unintended and dangerous leverage over individuals who seek nothing more than their lawful entitlements. Indeed, in this case, the SEC capitalized on the ambiguity inherent in the statute to mislead Petitioners about the SEC's intended application of the statute, thereby achieving a two-year asset freeze without having to present any evidence that the frozen payments were "extraordinary payments." The proper construction of Section 1103 is an

important question of federal law that will assist in defining the appropriate limitations on the powers of federal agencies, and "that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

I. BY PERMITTING A PRE-COMPLAINT FREEZE OF CONTRACTUALLY-BASED ENTITLEMENTS WITHOUT REQUIRING A SHOWING THAT THE PAYMENTS ARE EXCESSIVE OR UNUSUAL AS COMPARED TO SIMILAR PAYMENTS, OR THAT THEY ARE IN SOME RESPECT IMPROPER, THE NINTH CIRCUIT HAS RENDERED THE MODIFIER "EXTRAORDINARY" SUPERFLUOUS AND HAS DISREGARDED THE PURPOSE OF THE STATUTE

By using the term "extraordinary payments" in Section 1103, Congress plainly sought to limit in a significant fashion the class of payments subject to a pre-complaint freeze by the SEC, even where the SEC was investigating the individuals to whom the payments were to be made. In shifting the focus away from the payment itself and to the circumstances surrounding the payment, the Ninth Circuit improperly and unreasonably expanded the scope of Section 1103 to encompass *any* payment to be made by a company under investigation by the SEC. Citing revenue restatements, a falling stock price, and a public relations crisis surrounding Gemstar during the relevant period, the Ninth Circuit relied solely upon circumstances that are certain to be present *every time* an SEC investigation is commenced. (110a-111a) But, because Section 1103 requires *both* the existence of an SEC investigation *and* "extraordinary payments," something more than the circumstances justifying the commencement of a SEC investigation necessarily must be adduced in order to invoke Section 1103. (111a)

Indeed, the text and the legislative history of Section 1103 require that at least two factors be present. First, even the common meaning of "extraordinary" requires the SEC to come forward with objective evidence, based on past practices of similarly situated companies, as to what is ordinary and what is out of the ordinary. As the dissent below stated: "I must interpret 'extraordinary payments' to mean payments not usual or ordinary relative to those made by other comparable companies, under circumstances which have not resulted in an investigation by securities agencies, but are otherwise comparable." (115a) Under such a standard, payments of the type involved herein—i.e., contractually-based severance, vacation, bonuses, salary—would only be subject to seizure if they were shown, by objective, admissible evidence, to be truly "extraordinary" based on historic practices of comparable, similarly situated companies. As the dissent also observed, "extraordinary" is an inherently comparative concept, and thus requires a baseline of what is ordinary in a similar situation. The Ninth Circuit's interpretation required no such showing, nor was any such evidence adduced in the District Court. Thus, the payments at issue have been frozen for two years without the SEC even being required to establish the one and only substantive element found in Section 1103.

Second, the purpose of Section 1103, as reflected in the legislative history, also requires a showing that the payments were "improper" or "illegitimate" in some proven respect. In interpreting a significant piece of federal legislation such as the Sarbanes-Oxley Act, a court must be guided by the underlying purpose that led to congressional action. Singer, Norman, Sutherland, *Statutory Construction*, §45:09 (2000) (noting that "to determine legislative intent the court should look to the apparent statutory purpose as disclosed by the language

in light of the legislative history" and that "the primary task of the court when construing a statute is to attribute to the enactment the meaning most consistent with its policies and with the obvious purpose of the legislature, by viewing the statute in light of the circumstances that motivated its passage") (citations omitted).

In the case of the Sarbanes-Oxley Act, the circumstances giving rise to its enactment plainly reflect an intent to freeze or limit payments that are illegitimate or unwarranted. As the Ninth Circuit itself noted, Sarbanes-Oxley was the result of highly publicized and disturbing events in the American corporate world, in which our nation was "[f]aced with one cataclysmic corporate accounting scandal after another, including Enron, WorldCom, and Tyco." (72a) Section 1103 was "[e]nacted in the disturbing shadow of a flood of corporate scandals, its purpose is to temporarily protect corporate funds and the investing public and creditors against theft, fraud and dissipation." (71a-72a) It was a desire to limit or restrict payments infected with such impropriety that drove the passage of Section 1103.

The legislator who initially introduced Section 1103 (as Amendment No. 4188, see 148 Cong. Rec. S6542) was Senator Trent Lott. Senator Lott explained that Section 1103 was a response to specific wrongdoing. Senator Lott stated that the section "freezes payments of potential wrongdoers. This section would allow the SEC, during an investigation, to seek an order in Federal court imposing a 45-day freeze on extraordinary payments to corporate executives. Again, this year we have seen just that sort of thing happening. While an investigation [was] underway, basically rewards were given to these corporate executives." Senator Lott added that, if enacted, Section 1103 would ensure that corporate funds are not "improperly taken" for an "executive's personal

benefit," and would protect against "increased payments, extraordinary payments" being made during SEC investigations. 148 Cong. Rec. S6545 (2002).

As the sponsor of Section 1103, Senator Lott's comments on the purpose underlying the section are instructive, and are entitled to substantial consideration in construing the statute. *Galvan* v. *Press*, 347 U.S. 522, 526-27 (1954); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 279-80 (1947); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). But Senator Lott was not the only Senator to specifically refer to Section 1103 as intended to reach improper payments. Senator Hatch stated: "In particular, these provisions would enable to [sic] SEC to freeze *improper payments* by obtaining a federal court order." 148 Cong. Rec. S6550 (2002) (emphasis added).

Similar sentiments were expressed in the House debate over the bill. Congressman James Sensenbrenner stated that under Section 1103, executives will not be allowed to "pilfer the assets of the company by giving themselves huge bonuses and other extraordinary payments" during an SEC investigation. 148 Cong. Rec. H4685 (2002). Congressman Sensenbrenner continued, "Americans will know that corporate officers will no longer be able to misuse the bankruptcy laws to discharge liabilities based upon securities fraud, and the honest brokers of corporate America will know that those who abuse the law and tarnish corporate America's reputation will go to jail for a long, long time." *Id.*

The legislative history further demonstrates that a principal purpose of the freeze was to permit a review of "whether such payments were warranted or not." 148 Cong. Rec. H4687 (2002). Or, as Senator Biden noted, Section 1103 was a "45-day freeze . . . based upon the SEC being able to hold [it] in escrow and freeze it for 45

days *while they look at it*." 148 Cong. Rec. S6546 (2002) (emphasis supplied). Such an inquiry is necessary only if the targeted payments are presumed to be improper or questionable in some way that can be ascertained within a short period of time.

Finally, it is significant that, when President Bush outlined the legislative proposal that later became Sarbanes-Oxley, he called on Congress to strengthen the SEC's ability to temporarily freeze "improper" payments. *See* John Bostleman, *The Sarbanes-Oxley Deskbook*, § 13.6.2 (2003) (citing Press Release, President George Bush (July 9, 2002), *www.whitehouse.gov/ news/releases/ 2002/07/20020709-4.html*).

The *en banc* decision of the Ninth Circuit misinterpreted this legislative history. The Court made no inquiry to determine whether the payments to Yuen or Leung were the product of "theft, fraud and dissipation," were "increased payments" or "improper payments," or constituted the "pilfering" of Gemstar assets. Instead, the Court stated that it was only required to examine the circumstances surrounding the making of the payments and the size of the payments in determining whether a payment should be considered "extraordinary." (94a) These boundless and amorphous inquiries resulted in an interpretation of Section 1103 that is completely untethered from the purposes that underlie it. They did not require any showing that that payments were actually extraordinary as compared to similar such payments, nor do they require any showing that the payments were improper or unwarranted. In fact, the opposite was established here. The payments were a series of contractually based entitlements, which were substantially reduced from what was owed, and that had been reviewed and ultimately approved by Gemstar's Board of Directors after a five-month period of negotiations.

There was no evidence adduced that severance packages for the CEO and CFO of large-scale media and technology companies were unusual, or even were unusual at Gemstar. And there certainly was no evidence adduced that Petitioners failed to perform under their Employment Agreements or that the payments otherwise lacked consideration.

The lower court's application of the statute to the contractually based payments thus represents an extension of the statute far beyond its stated reach, providing the SEC unintended and absolute leverage over individuals under investigation.

For these reasons, a writ of certiorari must issue and the Ninth Circuit's judgment must be vacated.

II. SECTION 1103 VIOLATES THE FOURTH AMENDMENT BY PERMITTING A PRE-COMPLAINT ASSET FREEZE BY THE SEC WITHOUT REQUIRING A SHOWING OF PROBABLE CAUSE OR REASONABLE SUSPICION OF WRONGDOING BY THE OWNERS OF THE SEIZED ASSETS OR A NEXUS BETWEEN THE SEIZED ASSETS AND THE ALLEGED WRONGDOING

As interpreted by the Ninth Circuit, Section 1103 permits the SEC to obtain a freeze of assets merely upon a showing that an investigation has been commenced by the SEC. There is no requirement that the SEC even allege wrongdoing by the owners of the assets or that the assets be in anyway derived from, the product of, or connected to, wrongful conduct. There is no requirement of a showing of probable cause or even reasonable suspicion to justify a seizure. There is no requirement that a civil enforcement action be commenced or pending—it is simply the circumstance that a company is being *investigated*

that serves as the predicate for the Commission to freeze assets.

This sweeping grant of power represents an unprecedented expansion of the SEC's authority to obtain a judicial freeze of assets. When the SEC seeks a traditional judicial asset freeze under the Exchange Act or through an invocation of the court's equitable authority, courts typically require a factual showing that the underlying claims are meritorious, *SEC* v. *Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998), and that there is a legitimate concern that the assets sought to be frozen will be dissipated absent a freeze. *See SEC* v. *Gonzalez de Castilla*, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001). Courts also have considered the hardship that would be imposed upon the defendant if the freeze is granted, *SEC* v. *Householder*, 2002 WL 1466812, at *8 (N.D. Ill. July 8, 2002), whether the freeze is "narrowly tailored" to ensure that it does not interfere with legitimate business conduct, *SEC* v. *American Bd. of Trade, Inc.*, 645 F. Supp. 1047, 1050 (S.D.N.Y. 1986), *aff'd*, 830 F.2d 431 (2d Cir. 1987), and whether the amount of assets to be frozen exceeds the amount that could potentially be recovered by the SEC at the conclusion of a successful action. *SEC* v. *Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997); *see also SEC* v. *Hickey*, 322 F.3d 1123, 1131 (9th Cir. 2003) (freeze was justified where it was "necessary to give life to" previously entered disgorgement and contempt orders). Furthermore, in the context of traditional asset freezes, "[c]ourts generally frown upon asset freezes of unlimited duration." *SEC* v. *Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1325 (N.D. Ala. 2003) (citing SEC v. *Unifund SAL*, 910 F.2d 1028, 1042-43 (2d Cir. 1990)). As one court stated, "the decision to order a temporary freeze on defendants' assets . . . requires particularly careful consideration by the district court." *SEC* v.

Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972).

In stark contrast, Section 1103 authorizes a pre-complaint freeze, and requires only that it "appears to the Commission" that an "extraordinary payment" is about to be made by an issuer. There is no substantive standard that the SEC must meet to obtain a 45-day asset freeze, much less the sort of objective and non-arbitrary determination that should be required before a deprivation, even a temporary one, of any property occurs. This statutory scheme violates the Fourth Amendment's prohibition against unreasonable seizures.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that such rights "shall not be violated . . . . but upon probable cause." This court has explained that a "seizure" of property within the meaning of the Fourth Amendment occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). A temporary asset freeze constitutes a "seizure" under the Fourth Amendment. *See Colello* v. *SEC*, 908 F. Supp. 738, 752-53 (C.D. Cal. 1995) (SEC conceded, and court found, that asset freeze at issue "constitute[d] a 'seizure' within the meaning of the Fourth Amendment"); *see also Andrews* v. *Crump*, 984 F. Supp. 393, 410 (W.D.N.C. 1996) (finding that tax lien under state law "was a meaningful interference with possessory interests and, thus, a Fourth amendment seizure"). Thus, the SEC's effort to freeze petitioners' assets qualifies as a "seizure" under the Fourth Amendment.

As a general matter, a seizure is unreasonable absent a showing of probable cause that an offense has been committed. *See Colello*, 908 F. Supp. at 753. *Andrews*,

984 F. Supp. at 411. In *Colello*, the SEC froze the plaintiff's assets in Switzerland pursuant to a treaty that allowed for such seizures based on the government's "reasonable suspicion." *Colello*, 908 F. Supp. at 753. The plaintiff filed suit, arguing that the asset freeze was an unreasonable seizure in violation of the Fourth Amendment. The court agreed, rejecting the SEC's arguments that important law enforcement needs justified a "reasonable suspicion" standard. *Id.* at 754-55. Instead, the court held that the constitution demanded that the SEC show probable cause before freezing the plaintiff's assets. *Id.* at 754.

The Ninth Circuit ignored the principles set forth in *Colello*, the only case that directly addresses the Fourth Amendment issues implicated by asset seizures, and rejected Petitioners' Fourth Amendment challenge with barely any analysis, relying upon this Court's decision in *New York* v. *Burger*, 482 U.S. 691 (1987). Yet *Burger*, a case that was not cited or argued by the SEC, provides no support for dispensing with probable cause when the government seeks to deprive an individual of property for months or years at a time. In *Burger*, this Court addressed a Fourth Amendment challenge to brief, unannounced *searches* performed pursuant to a complex administrative statutory scheme that regulated automobile dismantlers. Moreover, the searches in *Burger* were sustained only because (i) vehicle dismantlers' businesses are highly regulated, and therefore those business have a reduced expectation of privacy, and (ii) the statute at issue in that case provided a "constitutionally adequate substitute for a warrant" because the "time, place and scope" of the searches was limited. *Burger*, 482 U.S. at 702-712. Petitioners' privacy interests, of course, have nothing to do with this case, and the property interest that they have in the restructuring payments is not "reduced." Accordingly, the first justification for

Burger's holding is not present here. In addition, Section 1103, especially as interpreted by the Ninth Circuit, provides no limits at all as to the types of payments that may be subject to a freeze once the SEC commences an investigation. It therefore provides no "constitutionally adequate substitute for a warrant"—if the warrant requirement is to have any meaning at all.

Because Section 1103 does not require a showing of probable cause that an offense has been committed or that the assets to be frozen are connected to such an offense, it violates the Fourth Amendment.

III. SECTION 1103 IS VOID FOR VAGUENESS AS APPLIED TO PETITIONERS BECAUSE THE SEC MISLED PETITIONERS AS TO THE SEC'S INTENT TO APPLY THE STATUTE TO THE RESTRUCTURING PAYMENTS

Section 1103 is unconstitutionally vague as applied to Petitioners. Section 1103 was passed in July 2002, during Yuen and Leung's negotiations concerning the restructuring payments. After the negotiations were concluded, in early October 2002, the SEC was informed by Gemstar of the precise size, nature and makeup of the restructuring payments to be paid to Petitioners. (ER 307-312.) Upon receiving this information, the SEC told Petitioners that, because the scope and reach of Section 1103 was at that time unclear, the SEC had not determined whether the restructuring payments would constitute "extraordinary payments" under the statute. Thereafter, and still prior to the closing of the restructuring in November 2002, the SEC appeared to admit that at least the vacation pay component of the restructuring payments would not be deemed an "extraordinary payment." (ER 19-21.) The SEC did not clarify its position on the breadth of Section 1103 before the restructuring closed on November 7, 2002.

Faced with a statute of uncertain scope and no guidance from the SEC or otherwise, Petitioners finalized the restructuring, only to be confronted—six months later—with a Section 1103 application claiming that *all* of the restructuring payments should be frozen based upon arguments and facts that the SEC had at their disposal in October 2002. Specifically, the SEC argued that the restructuring payments were "extraordinary payments" because (i) they were based upon Petitioners' employment contracts, which included incentive provisions, (ii) they were the subject of extensive negotiation, and (iii) they were multiples of Petitioners' salaries. Yet, the SEC cannot fairly be permitted to rely upon factors which it claims so clearly rendered the payments "extraordinary" in May of 2003, but which existed and were known to the SEC in October 2002, when Petitioners were deciding whether to close the restructuring and the SEC professed to be uncertain as to the application of Section 1103. Indeed, to permit the SEC to unfairly capitalize on the ambiguity inherent in Section 1103 in this fashion would be to countenance pure arbitrariness in the enforcement of federal law.

These circumstances are closely analogous to those in *Chalmers* v. *City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985), a case in which a vagueness challenge to an economic regulation was sustained. In *Chalmers*, a street vendor was faced with two patently conflicting ordinances regulating when and where she was permitted to sell her goods. *Id.* at 758. Faced with this ambiguity, Chalmers "sought both to consult relevant legislation in advance of her action and to clarify the meaning of the regulation by resort to City officials." *Id.* Notwithstanding this consultation, the City Attorney told Chalmers he was "not certain of the ordinances' meanings." *Id.* When Chalmers nonetheless decided to vend her wares, the City applied one of the two ordinances to

punish her. The court held that the city's ordinances were vague as applied, concluding that the "due process violation occurred in the manner in which this inconsistent scheme was implemented and enforced." *Id.*

Here, as in *Chalmers*, Petitioners were faced with an ambiguous business regulation, and unsuccessfully sought guidance from the government agency charged with the law's enforcement. After guidance was withheld and Petitioners finalized the restructuring, the SEC took advantage of the ambiguity and brought the full force of the statute down upon them. This arbitrary application of the new statute made it impossible for Petitioners to order their activities in a way that would not run afoul of the law. It therefore cannot be sustained under the due process clause.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

STANLEY S. ARKIN
Counsel of Record
MICHELLE A. RICE
SEAN R. O'BRIEN
ARKIN KAPLAN LLP
590 Madison Avenue, 35th Floor
New York, New York 10022
(212) 333-0200

Attorneys for Petitioners